

SERVICE DATE – JUNE 3, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35851

GREAT CANADIAN RAILTOUR COMPANY LIMITED D/B/A ROCKY MOUNTAINEER
— PETITION FOR EXEMPTION FROM 49 U.S.C. SUBTITLE IV

Digest:¹ The Board finds that it has jurisdiction over a passenger rail company that contracts with Amtrak to offer service between points in Canada and Washington State, but exempts that company from most of the Board's regulations.

Decided: June 2, 2015

On October 31, 2014, Great Canadian Railtour Company Limited d/b/a Rocky Mountaineer (Rocky Mountaineer or Petitioner) filed a petition for exemption under 49 U.S.C. § 10502 from 49 U.S.C. Subtitle IV of the Interstate Commerce Act (Subtitle IV). Rocky Mountaineer requests Board authorization to operate its rail passenger service between Vancouver, B.C., and Seattle, Wash., pursuant to a contract with the National Passenger Railroad Corporation (Amtrak), and concurrently requests an exemption from all common carrier obligations in Subtitle IV. Rocky Mountaineer also requests that it be excused from its past unauthorized operations conducted in 2013 and 2014.

BNSF Railway Company (BNSF) filed a reply on November 20, 2014, and a sur-reply on April 14, 2015. BNSF owns the Bellingham Subdivision, the rail line between Vancouver and Seattle over which Amtrak has contracted to serve Rocky Mountaineer. By filing dated March 25, 2015, Amtrak sought to intervene in this proceeding.

The Board finds that Rocky Mountaineer's proposed passenger rail service would be subject to Board jurisdiction. However, given the factual circumstances here, it is reasonable to exempt Rocky Mountaineer from Subtitle IV, except for those provisions specifically excluded from exemption by statute.²

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Board is statutorily precluded from exempting Rocky Mountaineer's operations from certain aspects of Subtitle IV, such as labor protection and some damage liability issues. See 49 U.S.C. §§10502(c) and (g).

BACKGROUND

Rocky Mountaineer states that it is a Canadian excursion company established in 1990 that operates the largest privately owned passenger rail service in North America.³ In its petition, Rocky Mountaineer seeks a Subtitle IV exemption for a new excursion service that uses Rocky Mountaineer's locomotives and Amtrak's train and engine crews.⁴ This new service, which was tested in August 2013 and initiated in May 2014, extends Petitioner's two-day train routes between Vancouver and the Canadian Rockies with an additional half-day journey between Vancouver and Seattle.

Rocky Mountaineer owns a fleet of passenger cars and locomotives and employs a staff of car attendants, tour guides, lounge employees, and equipment maintenance personnel for its excursion routes.⁵ Rocky Mountaineer does not own, lease, or operate any rail lines in either Canada or the United States. Rocky Mountaineer has entered into a contract with Amtrak to provide train and engine crews for the proposed passenger excursion service between Vancouver and Seattle over BNSF's Bellingham Subdivision.⁶ Rocky Mountaineer states that it will access BNSF's Bellingham Subdivision pursuant to its agreement with Amtrak, and that Amtrak's access to the line is covered by Amtrak's agreement with BNSF.⁷

Rocky Mountaineer states that it did not previously seek authorization for its operations because it was unaware that Board authority was required.⁸

In its November 20, 2014 reply, BNSF urged the Board to deny Rocky Mountaineer's petition. BNSF stated that although it had informally agreed, in the past, to allow Amtrak to use the Bellingham Subdivision for a specified, limited number of Amtrak-operated Rocky Mountaineer trains (two round trips in 2013 and 12 round trips in 2014), there was no agreement in place with Amtrak to allow for the operation of Rocky Mountaineer beyond those instances, nor had Amtrak requested such permission. BNSF also expressed concern that the operation of any Rocky Mountaineer trains beyond 2015 would be a problem due to anticipated increases in freight traffic on the Bellingham Subdivision.

On January 29, 2015, the Board instituted a proceeding. Subsequently, in a decision served on March 4, 2015, the Board directed Rocky Mountaineer to reply to BNSF's November 20th reply and to address the following issues:

³ Pet. 3.

⁴ Simultaneously with the filing of its petition, Rocky Mountaineer filed a Motion for Protective Order covering its confidential agreement with Amtrak.

⁵ Pet. 5.

⁶ Pet., V.S. Sammut 4.

⁷ Pet. 12.

⁸ Id., V.S. Sammut 5.

(1) why an exemption permitting Rocky Mountaineer's proposed operations should be granted when: Rocky Mountaineer has no contract with BNSF to operate over the line; BNSF argues that its agreement with Amtrak does not allow for Rocky Mountaineer's use of the line; and BNSF opposes the petition for exemption;

(2) if BNSF were to contractually agree to permit Rocky Mountaineer's service for the 2015 season only, what expectation would Rocky Mountaineer have to continue seasonal service over BNSF's line beyond 2015; and

(3) whether BNSF would have any means of removing Rocky Mountaineer from the line if the Board were to authorize Rocky Mountaineer to provide rail passenger service and exempt it from all Subtitle IV requirements permitted by the statute, including exit licensing.

Amtrak petitioned to intervene on March 25, 2015. In its filing, Amtrak points to its right to operate charter and special trains owned by third parties such as Rocky Mountaineer over the tracks of host freight railroads, pursuant to 49 U.S.C. § 24308.

In a corrected response filed on April 13, 2015, Rocky Mountaineer states that an agreement has been reached that permits Rocky Mountaineer to provide service over the Bellingham Subdivision for 2015. Rocky Mountaineer acknowledges that its trains could only operate over BNSF tracks to the extent that BNSF concurs in Amtrak's operation of those trains. Further, Rocky Mountaineer states that it is negotiating with Amtrak and BNSF for continued service beyond 2015. Rocky Mountain also contends that granting it an exemption from the requirements of Subtitle IV would be consistent with The Pullman Sleeping Car Co.—Petition for Exemption from 49 U.S.C. Subtitle IV (Pullman), FD 35738 (STB served Feb. 5, 2015).

On April 14, 2015, BNSF filed a sur-reply confirming that an agreement between Amtrak and BNSF has now been reached to permit Amtrak to operate Rocky Mountaineer's trains over the Bellingham Subdivision for 2015. BNSF therefore withdraws its objection to the exemption sought by Rocky Mountaineer. BNSF also states that, in view of the agreements reached between Rocky Mountaineer, Amtrak, and BNSF, the Board need not address the question of Amtrak's rights under § 24308.

We will grant Amtrak's petition to intervene and will accept BNSF's April 14th sur-reply in the interest of compiling a more complete record. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply "(i)n the interest of compiling a full record"); Denver & Rio Grande Ry. Historical Found.—Pet. for Declaratory Order, FD 35496, slip op. at 3 (STB served Feb. 23, 2012).

DISCUSSION AND CONCLUSIONS

Under § 10501(a), the Board has jurisdiction over "transportation" by "rail carrier" as part of the interstate rail network. Rocky Mountaineer's operations meet this definition.

“Transportation” is defined, among other things, as services related to the movement of passengers, property, or both by rail. 49 U.S.C. § 10102(9). The service Rocky Mountaineer offers includes the movement of passengers by rail. The statute does not require that transportation encompass movement from an origin to destination as its sole or main purpose, only that movement is involved. 49 U.S.C. §§ 10102(9), 10501(a)(2). Moreover, the Board’s jurisdiction includes rail transportation between the United States and a place in a foreign country. 49 U.S.C. § 10501(a)(2)(F). Thus, Rocky Mountaineer’s service between Canada and Seattle clearly constitutes transportation subject to Board jurisdiction within the meaning of the statute.

Further, Rocky Mountaineer is a rail carrier—“a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). The transportation Rocky Mountaineer offers is railroad transportation, as “railroad” embraces not only road owned and operated directly, but also road operated under an agreement. 49 U.S.C. § 10102(6)(B). Rocky Mountaineer’s arrangement with Amtrak is such an agreement. Additionally, Rocky Mountaineer “holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation” and is therefore a common carrier. American Orient Express Railway v. STB (American Orient Express II), 484 F.3d 554, 557 (D.C. Cir. 2007).⁹ Moreover, in Pullman, the Board found that it had jurisdiction over a company providing sleeping car service and dining and lounge facilities in rail cars that were attached to Amtrak trains pulled by Amtrak locomotives. Rocky Mountaineer’s operations are similar to those in Pullman, except that Rocky Mountaineer’s trains are freestanding and pulled by its own locomotives using Amtrak train and engine crews. For the reasons discussed above, we find that the service Rocky Mountaineer provides is “transportation” by “rail carrier” and thus subject to our jurisdiction under 49 U.S.C. § 10501.

Having found that Rocky Mountaineer is a rail carrier subject to our jurisdiction under 49 U.S.C. § 10501, it must now be determined whether and to what extent Rocky Mountaineer should be exempt from Board regulation. Under 49 U.S.C. § 10502, the Board will exempt a transaction or service from regulation when: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 (RTP); and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. Here, Rocky Mountaineer seeks a blanket exemption from Subtitle IV. To support this request, Rocky Mountaineer cites American Orient Express Railway—Petition for Declaratory Order (American Orient Express I), FD 34502 (STB served Dec. 29, 2005), aff’d sub nom. American Orient Express II and Pullman, where the Board recently granted a broad exemption to a passenger excursion service.

We find that regulation by the Board is not necessary to carry out the RTP. An exemption here from Subtitle IV would be consistent with 49 U.S.C. § 10101(2) by minimizing the need for regulatory control over transportation for which such control is unnecessary. In

⁹ In American Orient Express II, the United States Court of Appeals affirmed the Board’s holding that the Board had jurisdiction over the operations of a passenger rail company that marketed and sold vacations aboard vintage railcars attached to Amtrak train consists.

addition, consistent with 49 U.S.C. §§ 10101(5), (7) & (9), an exemption would foster sound economic conditions in transportation and encourage efficient management by allowing Rocky Mountaineer to enter and exit passenger routes without the need for regulatory approval. Rocky Mountaineer states that it may change service frequencies based upon seasonal demands and market potential and that an exemption from the requirement of seeking Board authority in each instance would allow Rocky Mountaineer more flexibility in meeting the demands for its services.¹⁰ Requiring Rocky Mountaineer to come to the Board for authority each time it proposes to change its service frequencies would be an unnecessary burden. Pullman, slip op. at 4. Other aspects of the rail transportation policy would not be adversely affected.

Also, Rocky Mountaineer's service would not result in market power abuse as the record indicates that its customers have many other transportation options available to them (i.e., other passenger services, travel by air carrier, charter bus trips, etc.). Rocky Mountaineer's proposal is also of limited scope in that it is only offering its luxury passenger service via Amtrak between designated points in connection with its tours to the Canadian Rockies.

Accordingly, Rocky Mountaineer's request for exemption from Subtitle IV for the operations as described in its petition will be granted, with the exception of those specifically precluded from exemption by statute. The exemption granted by this decision, however, applies only to Rocky Mountaineer's operations as described in its petition (i.e. passenger rail service provided using Rocky Mountaineer's locomotives and operated by Amtrak train and engine crews), and does not extend to any new activities, or new types of operations or services, that Rocky Mountaineer may offer in the future or to any service offered in conjunction with any carrier other than Amtrak.¹¹ This exemption is consistent with the exemption granted in Pullman and with the findings there that requiring Board approval is an unnecessary burden for this specific type of service. The Board's exemption gives Rocky Mountaineer the right to operate its excursion trains, using Amtrak train and engine crews, on any rail line where the host carrier will allow it to operate.¹²

Rocky Mountaineer also requests that it be "excused" from its past unauthorized services conducted in 2013 and 2104. Petitioner has not sought retroactive application of the Board's authorization, and indeed, the exemption invoked by Petitioner does not provide for retroactive effectiveness. However, given the factual circumstances presented, the Board does not intend to pursue an enforcement action against the Petitioner for its previously unauthorized operations. Cf. David W. Wulfson—Control Exemption—Clarendon & Pittsford R.R., FD 33607 (STB served Aug. 20, 1998).

¹⁰ Pet. 15.

¹¹ Rocky Mountaineer would need to seek prior Board approval in such situations.

¹² Given that the parties have reached an agreement to allow the Rocky Mountaineer service to continue, there is no need for the Board to address the other issues previously raised in this proceeding, including the scope of Amtrak's rights under § 24308.

It is ordered:

1. Rocky Mountaineer's operations, as described in its petition, are exempted from 49 U.S.C. Subtitle IV, except for those provisions statutorily precluded from exemption.
2. The exemption granted to Rocky Mountaineer here shall also apply to any future passenger rail excursion operations and services in the United States that Rocky Mountaineer may undertake, so long as the operations and services are of the same nature and scope as those described by Rocky Mountaineer in its petition.
3. Amtrak's petition to intervene is granted.
4. BNSF's sur-reply is accepted.
5. This decision is effective on the date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.